Supreme Court, U. S.
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SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1978

NO. 78-380

SHELDON M. TUZMAN,

Petitioner,

VS.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

By: G. Lee Dickens, Jr.
ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

SHELDON M. TUZMAN, Petitioner,	)	No. _____
vs.	)	Number 55088
STATE OF GEORGIA, Respondent.	)	COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Comes now Sheldon M. Tuzman and prays that a writ of certiorari issue directed to the Court of Appeals of Georgia in the above-styled case and states the following grounds for said petition:

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 145 Ga. App. 761, 244 S.E.2d 882, (1978). The denial of Petitioner's request for a writ of certiorari by the Supreme Court of Georgia is reported at _____ Ga. ____, _____ S.E.2d _____, (1978).

JURISDICTION

The judgment of the Court of Appeals of Georgia was rendered on April 5, 1978 in Case Number 55088. Petitioner's Motion for Rehearing was denied on April 28, 1978. Petitioner then applied to the Supreme Court of Georgia for a Writ of Certiorari to the Court of Appeals of Georgia in Docket Number 33816. The Supreme Court of Georgia denied petitioner's application for a writ on June 9, 1978. Copies of the opinion of the

Court of Appeals of Georgia are appended to this petition in the appendix at pp. 36-58 . The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether introduction of evidence in relation to offenses for which a criminal defendant is not on trial violates that defendant's constitutional rights to a fair and impartial trial, to equal protection under the laws, to defend his cause before the courts, to be tried before an impartial jury, of requiring proof of his guilt beyond a reasonable doubt, and not to be placed in jeopardy more than once for the same offense where the criminal defendant (a) has not been convicted of the offenses, (b) the State is barred by the Statute

of Limitations from prosecuting the offenses, (c) the State fails to prove the commission of prior offenses at trial and (d) the trial judge, despite request, fails to instruct the jury how to analyze the evidence of prior offenses.

2. Whether execution of a search warrant on the premises of a criminal defendant's business violates that defendant's right to be safe from unreasonable searches and seizures, when a period of nine months intervened between the last date on which law officers had obtained information about the location of items sought to be seized and the date the warrant was issued.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Admendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code Annotated §38-202

The general character of the parties, and especially their conduct in other transactions are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct.

Found in Volume 13, page 460 of the Code Annotated of Georgia.

STATEMENT

The facts necessary to place in their settings the questions now raised

are basically as follows:

Petitioner, Dr. Sheldon M. Tuzman, is a licensed dentist practicing in Baldwin County, Georgia. Dr. Tuzman participated in dental service for eligible medicaid recipients for a period of time including the years, 1973 and 1974. After the State conducted audits in March 1975 and December 1976 of Dr. Tuzman's work in regard to a number of medicaid recipients, the State sought and obtained two search warrants, which warrants are dated February 23, 1977 [Motion to Suppress Transcript (hereinafter MST)]. In the late evening and night of February 23, 1977 (MST p. 82), the search warrant directed to Dr. Tuzman's office was executed, and the State seized more than 60 sets of records on various dental patients, as

well as dental appliances (MST p. 163). After this search warrant was executed, Dr. Tuzman filed a Motion for Return of Property and to Suppress as Evidence Property Illegally Seized (R.3-28) which raised Petitioner's contention that said search violated Petioner's rights under U.S. Const. Amendments IV and V (R.12-13) upon which hearings were held and evidence admitted before the Honorable George L. Jackson, Judge (MST p. 1-584). After these hearings, Judge Jackson denied defendant's motion (MST p. 584) and issued an order to that effect dated April 14, 1977 (R.153-156). At trial, Petitioner's objections to admission of evidence of the search and seizure and the fruits thereof were overruled after Petitioner had incorporated by reference his previous contentions of illegality (T.p.479) and the evidence was used

against Petitioner (T.p.481, et. seq., 1931-1933). The court also overruled Petitioner's Motion for Mistrial based upon the admission of such evidence (T.p.1862).

On April 1, 1977, Petitioner was indicted for 41 counts of theft by deception (R.90-133). Of these 41 counts, there were 30 misdemeanor counts and 11 felony counts. On April 26, 1977, Petitioner filed a Plea in Bar (R.159-162) alleging that the statute of limitations barred prosecution of all misdemeanor counts. On May 9, 1977 after a pre-trial hearing, (Plea in Bar T.P.1-103), Superior Court Judge George L. Jackson granted Petitioner's Plea in Bar and barred further prosecution of the 30 misdemeanor counts (R.189). This order was affirmed by the Court of

Appeals of Georgia on March 10, 1978 in an opinion reported at 145 Ga. App. 481, 243 S.E.2d. 675 (1978).

After these various matters had been decided, the State prosecuted Petitioner on the eleven (11) felony counts alleged in the indictment. Prior to the commencement of proof in Appellant's trial, the court overruled Petitioner's Motion to exclude evidence of offenses for which Petitioner was not on trial, despite Petitioner's objection that introduction of such proof would violate Petitioner's Fifth, Sixth, and Fourteenth Amendment rights. Petitioner also contended in his objection even if evidence of independent crimes were theoretically admissible, the state would be required to make a prima facie showing of guilt with regard to each

independent crime outside the jury's presence before evidence of same should be admitted (T.p.383-397). During the trial, the State on numerous occasions introduced testimony and other evidence in regard to the misdemeanor counts in the multi-count indictment. This evidence was admitted over petitioner's continuing objection (T.p.397) in each of the instances enumerated in Appendix pp. 61-66 . In addition, evidence of other alleged offenses for which Petitioner was not on trial was admitted (T.p.1204,1675-1678). The court overruled Petitioner's Motion for Mistrial which motion was based on the prejudicial admission of such evidence (T.p.1862).

The trial court, in its charge to the jury, did not instruct the jury on how to consider the evidence presented

of other alleged offenses for which Appellant was not on trial, refusing Petitioner's Request to Charge #1 (R.194-197) (T.p.1954).

After a two week trial, the jury returned its verdict on the various counts before the court, finding Appellant not guilty on eight (8) counts and guilty on three (3) counts (T.p.2080). The court pronounced its sentence with regard to the three counts in which the jury had returned a verdict of guilty (T.p.2120). It is from these verdicts and the sentences thereon that Appellant filed his Notice of Appeal on June 3, 1977 (R.1-2). The case was first filed in the Supreme Court of Georgia and argument was heard before that court, but the case was transferred to the Court of Appeals of Georgia by Order

dated October 25, 1977 and the case was heard before that court. The Court of Appeals of Georgia rendered its decision on April 5, 1978 a copy of which is found in Appendix pp. 36-58 . Motion for rehearing in the Court of Appeals was denied on April 28, 1978. Application for a Writ of Certiorari was denied by the Georgia Supreme Court on June 9, 1978. Notice of Intent to Apply to the Supreme Court of the United States for a Writ of Certiorari was filed with the Clerk of the Court of Appeals of Georgia on June 13, 1978.

The portions of the record cited herein to show that the Federal question was timely raised are set out in full at Appendix pp. 102-149.

ARGUMENT

This case presents the question of whether or not evidence can be admitted against a criminal defendant which relates to allegations of crimes for which that criminal defendant is not on trial when the State fails to show that the matter is a crime or even wrongdoing. Additionally, the case presents the court with an opportunity to clarify the rules with regard to staleness of information in a search warrant affidavit.

I.

One of the basic tenets of the American system of justice is that a criminal defendant should be tried fairly by an impartial jury and should be found to have committed an offense beyond a reasonable doubt before he is held accountable for that offense. As a part of this same principle, the Fifth

Amendment as applied to the States through the Fourteenth limits the State to one attempt at prosecution for each offense. In this case, the State of Georgia has tried to punish Petitioner twice for a series of allegations of misdemeanor theft by deception, first by attempting to prosecute Petitioner on these allegations, and then when such offenses were ruled to be barred by the Statute of Limitations, to use these allegations to create an atmosphere of prejudice and generalized wrongdoing from which a jury produced three verdicts of guilty on felony allegations.

While this court has considered some aspects of the use of evidence of other offenses, Petitioner has not found any decisions exactly on point. It is clear that evidence of crimes other than

that for which a defendant is on trial is not admissible to prove that the accused is likely to have committed the crime in question, Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Numerous exceptions have been made by the courts to this exclusionary rule. This case squarely presents the question of what Fifth, Sixth and Fourteenth Amendments limits exist to the use of such evidence, and specifically whether the exception which allows evidence of similar crimes to be used to show motive, intent, or scheme of mind is valid where the defendant has not been convicted of such crimes, the State is barred from prosecuting the defendant for such crimes, and the State fails to prove the commission of the crimes at trial.

The exclusionary rule in the State of Georgia is Georgia Code Annotated §38-202; the rule is based on relevancy. The Georgia courts have carried the so-called "similar-crimes" exception to the rule to what Petitioner asserts is an unconstitutional extreme. In Georgia, evidence of a crime of which the Defendant has been tried and acquitted may be used against him in a subsequent prosecution of a similar offense. Rivers v. State, _____ Ga. _____, _____ S.E.2d _____ (Case No. 55708) in Court of Appeals of Georgia, decided July 14, 1978), Taylor v. State, 174 Ga. 52, 162 S.E. 504 (1932). Petitioner was not tried for the independent crimes which were later introduced against him at trial, but the charges were dismissed against him on the basis of the substantive law of the Statute of Limitations.

The Georgia Court of Appeals in its decision in this case held that the State was not required to prove the criminal elements of the independent "crimes" before utilizing evidence of these "crimes" at trial. Petitioner asserted in the courts below that the State failed to show that Petitioner had actually committed the independent crimes, and that evidence which showed perhaps some but clearly not all of the elements of the "similar crimes" could not possibly be relevant to show Defendant's intent with regard to the felony counts on which he was being tried. The jury was never instructed, despite Petitioner's request, to analyze the evidence of similar offenses to determine whether the State had proved crimes, but was rather instructed to consider

the evidence of independent "crimes" as showing motive, scheme of mind, and intent. Petitioner also asserted below and maintains before this court that such an error has constitutional dimensions.

This court has recognized that evidence of prior offenses cannot be used against the Defendant where the prior convictions were constitutionally invalid due to a denial of the right to counsel, Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed2d 374, (1972). The Court based its decision in Loper, supra on the concept of fundamental fairness, stating that: ". . .the conclusion is inescapable that the use of convictions constitutionally invalid under Gideon v. Wainwright to impeach Defendant's credibility deprives him of due process of

law" supra at 48. Petitioner requests this Court to grant certiorari to determine whether use of evidence of an unproven prior offense, which remains unproven after trial, similarly violates due process of law.

The use of similar offense evidence is extremely useful to prosecutors in bolstering an otherwise poor case, in distracting the jury from the facts of the crime on trial, and in implying a specific intent to a defendant's actions. Recognizing that the result is usually devastating to a defendant, prosecutors have sought to expand the exceptions to the exclusionary rule, as evidenced by the large volume of reported cases litigating this issue. Numerous authorities have commented on the prejudice to a defendant which necessarily flows from

proof (or attempted proof) of prior offenses. See Bray, Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions, 28 Univ. of Miami Law Review 489 (1974). The Federal Circuit Courts of Appeal have established varying criteria as to when such evidence is admissible, and at least one circuit judge has voiced a desire for specific guidance. United States v. Burkhart, 458 F.2d 201 (1972) (Barrett, C. J., concurring and dissenting). On the specific issue of what degree of proof of the independent crimes is required the States and the Federal Circuit Courts of Appeal are divided. At one extreme, Petitioner believes, is the Georgia rule outlined above. Meanwhile, the majority of the Circuits require that proof of the prior offense be plain, clear and conclusive,

Paris v. U.S., 260 F.529 (1919), Kraft v. U.S., 238 F2d 794 (8 Cir 1956), U.S. v. Broadway, 477 F.2d 991 (5 Cir 1973). Once such proof exists, a widely used guideline for admission of such evidence is an evidentiary rule that balances the probative value of such evidence against the danger of unfair prejudice. See Federal Rule of Evidence, Rule 403. The Georgia Court of Appeals in the case instanter applied such a rule in responding to Petitioner's constitutional objections but failed to require the prosecutors to provide clear and convincing proof of crime before balancing the probative value against the prejudice. Such an evidentiary rule does not adequately respond to situations where the prior offense is unproven, and Petitioner respectfully submits the need for guidance from this Court still

exists. If this Court would grant the writ on this basis it could set appropriate standards for admission which would assure that all criminal defendants do not have to fight a burdensome prejudice created by the State out of irrelevant acts which have not been shown to be wrongdoing. It could also clarify the parameters of the Fifth, Sixth and Fourteenth Amendment protections of criminal defendants in this area. Petitioner asserts that these standards are sorely needed to rectify the intolerable leniency of many courts in admitting evidence of offenses for which a criminal defendant is not on trial, in light of the patent prejudice which such evidence fosters.

II.

This court should also grant the

writ to express in unqualified terms the standards by which the "freshness" or "staleness" of information in search warrants can be judged. In the present case, Petitioner's office was subjected to a search and records were seized, despite a time gap of more than nine months from the last date on which the State had solid information as to the whereabouts of the items seized. Such a length of time is an unreasonable period and it would greatly assist trial courts if this court could clarify the Fourth Amendment requirements regarding the staleness of information in search warrant affidavits.

This court has recently shown its continued interest in upholding the Fourth Amendment protection against

unreasonable searches of business premises in Michigan v. Tyler, 436 U.S. ____, 98 Sup. Ct. _____, 56 L.Ed 2d 486, 46 U.S.L.W. 4533 (1978) and Marshall v. Barlow's Inc., 436 U.S. ____, 98 Sup. Ct. 1816, 56 L.Ed 2d 305 (1978). Marshall, supra and Tyler, supra reaffirmed the constitutional protection of business premises against warrantless searches, and Petitioner asserts that a warrant based on stale information would likewise be protected by the Fourth Amendment protection. Additionally, this Court recently decided Franks v. Delaware, 77-5176 on June 26, 1978, a case which petitioner has been unable to review since it has not been published in advance sheets, which apparently supports petitioner's claim of no probable cause where mis-

statements are made to obtain a warrant.

In Sgro v. United States, 287 U.S. 206, 53 S. Ct. 138, 77 L.Ed. 260 (1932) this court held on the basis of a prohibition statute that a search executed a mere twenty (20) days after obtaining the information leading to the issuance of the warrant was invalid. In Sgro, supra, the court addressed the following remarks to search warrants in general at 210-211:

> . . .The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. Boyd v. United States, 116 U.S. 616, 635, 39 L.ed. 746,

> 752, 6 S.Ct. 524; Byars v. United States, 273 U.S. 28, 32, 71 L.ed. 520, 523, 47 S.Ct. 248; Marron v. United States, 275 U.S. 192, 196, 197, 72 L.ed. 231, 237, 48 S.Ct. 74; United States v. Lefkowitz, 285 U.S. 452, 464, 76 L.ed. 877, 882, 82, A.L.R. 775, 52 S.Ct. 420.
>
> . .
>
> . . .it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.

Petitioner submits that where the State courts have allowed a search and seizure as late as nine months after obtaining

information as to the whereabouts of the things sought to be seized, that such courts need definitive guidance as to the constitutional protections against stale search warrants. In light of the above, Petitioner requests that this court grant a writ of certiorari to review the search and seizure of items from Petitioner's offices.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this court grant a Writ of Certiorari to the Court of Appeals of Georgia.

G. L. Dickens, Jr.
(G. Lee Dickens, Jr.)
ATTORNEY FOR PETITIONER

PROOF OF SERVICE PURSUANT TO RULE 33 SUPREME COURT RULES

I, G. Lee Dickens, Jr., the attorney for Sheldon M. Tuzman, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of September, 1978, I served copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA on the State of Georgia through its counsel of record as follows:

By mailing three copies of said petition postage prepaid, to each of the following three persons at his address indicated below, viz:

Mr. Joseph H. Briley, District Attorney
P. O. Box 361
Gray, Georgia 31032

Mr. Arthur K. Bolton, Attorney General
Room 132, Judicial Building
Capitol Square
Atlanta, Georgia 30334

Mr. J. Melvin England, Special Prosecutor
1016 Atlanta Center Limited Building
250 Piedmont Avenue, N.E.
Atlanta, Georgia 30308

This 1st day of September, 1978.

G. L. Dickens, Jr.
(G. Lee Dickens, Jr.)
Attorney for Petitioner

APPENDIX TO PETITION FOR CERTIORARI

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No._____

SHELDON M. TUZMAN,	)
Petitioner,	)
v.	)
THE STATE OF GEORGIA,	)
Respondent.	)

Petition for Certiorari to the Court of Appeals of Georgia

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SHELDON M. TUZMAN

V.

THE STATE

No. 55088

COURT OF APPEALS OF GEORGIA

April 5, 1978

REHEARING DENIED APRIL 28, 1978

SMITH, Judge.

Tuzman, a licensed dentist, was convicted on three felony counts of theft by deception in connection with falsification of Medicaid claims. On appeal, he contends that evidence of independent similar crimes was erroneously introduced, that the seizure of records from his files was illegal, that he was prevented from cross examining state witnesses about relevant matters, that a dentist was allowed to

testify to opinions outside his field of expertise, that a jury list was improperly drawn, that exculpatory evidence was not disclosed by the court following an in camera inspection of that evidence, that experimental evidence was erroneously admitted, and that the charge to the jury failed to include instructions on how to handle the evidence of independent similar crimes. We find no reversible error and affirm.

After extensive investigation by the state and appointment of a special prosecutor, the appellant was indicted on 41 separate counts of theft by deception. Basically, he was charged with having submitted to the State of Georgia claims for work allegedly performed on Medicaid recipients, which work was never performed. Numerous

motions were presented to the trial court, and extensive hearings were held thereon. The court granted a plea in bar as to 30 of the counts on the grounds that those counts involved less than $100 and were therefore misdemeanors barred by the statute of limitation. (The state appealed that judgment in State v. Tuzman, 145 Ga.App. 481, 243 S.E.2d 675 (1978). Evidence relating to these barred counts was introduced at trial for the purpose of showing the appellant's motive, scheme, and intent. Also introduced over objection was evidence seized, pursuant to a search warrant, from the appellant's files. A pre-trial motion to suppress this evidence had been denied. A lengthy and complex trial was had on the remaining eleven counts (the trial lasted two

weeks; the transcript contains well over 2000 pages; and there are more than 100 documentary exhibits) and the jury found the appellant guilty on three of the eleven counts. On each of the three counts, the appellant was fined $2000 and placed on five years' concurrent probation. This appeal followed.

1. During the trial, the state introduced evidence concerning the 30 misdemeanor counts barred by the statute of limitation. This evidence was admitted, over objection, because the state was using it as proof of the appellant's alleged guilty knowledge, scheme, motive, and intent. The appellant contends this evidence was inadmissible because it (a) denied him his constitutional guarantees to a fair and

impartial trial; and (b) failed to make out proof of the commission of an independent crime.

[1,2] A. Fair Trial. Objections to evidence such as that here are typically based on Code §38-202, which declares to be irrelevant evidence of conduct in other transactions and evidence of general character. It has long been held that where evidence is introduced for some relevant purpose, such as to show motive, or intent, the fact that it incidentally places character in issue will not render it inadmissible. E. g., Jackson v. State, 76 Ga. 551(8) (1886); Tiller v. State, 196 Ga. 508(3), 26 S.E.2d 883 (1943). However, the Supreme Court (Payne v. State, 233 Ga. 294, 210 S.E.2d 775 (1974)) and this court (Carroll v.

State, 143 Ga.App. 796, 240 S.E.2d 197 (1977)), recognizing the prejudicial impact of placing the defendant's character in issue, have applied a balancing test which will not allow the admission of evidence of independent crimes "unless its relevance to the issues at trial outweighs its prejudicial impact." Payne, supra, 233 Ga. p. 312, 210 S.E.2d p. 787. We have recently applied this test in Parker v. State , 145 Ga.App. 205, 243 S.E.2d 580 (1978); Clark v. State, 144 Ga.App. 650, 242 S.E.2d 316 (1978). Carroll v. State, supra; and Hanson v. State, 143 Ga.App. 200, 237 S.E.2d 699 (1977). We believe that the balancing test takes into account on one hand the state's legitimate need to prove--and difficulty in proving--the defendant's intangible

intent, motive, and state of mind, and on the other hand the defendant's right to a trial free from undue prejudice or bias. Thus, we believe the balancing test answers the appellant's constitutional objections, for, so long as the admitted evidence was more relevant to a disputed issue than it was prejudicial, it did not destroy the fairness of the trial. We so conclude here: the evidence was relevant to prove guilty knowledge and intent, and the intent element was the essence of the appellant's defense. In contrast, the evidence was not overly prejudicial here, as the jury was cautiously instructed that the appellant was on trial only for the eleven felony charges. In specific answer to the appellant's contentions, we do not agree that the introduction

of this evidence of very similar independent acts denied the appellant's constitutional rights to a fair and impartial trial and jury, to equal protection, not to be placed twice in jeopardy for one offense, to have his guilt proved by the state, and to defend his cause before the courts.

[3] B. Proof of Independent Crime. There is no merit in the appellant's contention that this evidence was inadmissible because it failed to prove all the elements of commission of any independent crimes. The cases cited by the appellant, French v. State, 237 Ga. 620, 229, S.E.2d 410 (1976) and Howard v. State, 211 Ga. 186, 84 S.E.2d 455 (1954), stand only for the propositions (1) that the independent acts must be logically similar to the current charge

and (2) that it must be proved that the defendant on trial committed those acts. Whereas proof of the various elements of the separate crime is helpful toward establishing a logical nexus between that crime and the one at trial, proof of the identity of the perpetrator of the separate crime is essential. That proof was present here.

2. The trial court correctly denied the appellant's motion to suppress evidence seized from the appellant's office files, and that evidence was properly admissible at trial. The contentions here are that there was no probable cause to issue a warrant, and even if there were probable cause, the appellant's private papers were not seizable.

A. Probable Cause. The appellant

contends the information relayed to the judge who issued the warrant was stale, was inaccurate, and was unsupported hearsay.

Staleness. An affidavit issued in support of the warrant application showed that there had not been a direct observation of the sought files since nine months earlier. Additional information presented to the issuing judge showed that the continued existence of these files had been circumstantially corroborated about ten days before the warrant was sought, and attached to the warrant application was a Medicaid agreement in which the appellant agreed to maintain the partic ular records being sought. Despite the substantial time lapse, we believe the type of crime and evidence involved

prevents a staleness problem from arising in this case.

[4] The question is one of reasonability: Is the lapse of time so long that it is no longer reasonable to believe that the same conditions described in the affidavit remain at the time a warrant is issued? Fowler v. State, 121 Ga.App. 22, 172 S.E.2d 447 (1970). In State v. Boswell, 131 Ga.App. 657, 659, 206 S.E.2d 682 (1974), this court referred to a collection of "staleness cases" in Annotation, 100 A.L.R.2d 525, and noted, "The cases are unanimous in holding intervals of two months or more between the act and the affidavit to be impermissible." Though this statement was not the holding of Boswell, the appellant is apparently contending that lapses of more than two

months are per se unreasonable. But nicely drawn time lines are simply inadequate to resolve staleness questions, for the ultimate question is whether, under all the facts and circumstances of the particular case, information about evidence is so fresh that there is probable cause to believe the evidence still exists in the same place, or is so stale that such a conclusion of probable cause is unreasonable. An excellent perspective of this question is found in Andresen v. State, 24 Md.App. 128, 172, 331 A.2d 78, 106 (1975), where a warrant was issued to seize records from an attorney's file:

"The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case

law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entreached?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The

hare and the tortoise do not disappear at the same rate of speed. The massive records and files of the appellant-attorney and his protean corporate extensions in this case are more akin to the latter than to the former."

[5] We believe the appellant's files here are much the same as the attorney's files in Andresen; they are permanent in character and they are likely to be maintained in one place much longer than would be illicit drugs, stolen merchandise, or murder weapons. We do not believe the nine-month time lapse here prevented a proper determination that there was probable cause to believe the records would be found in the appellant's office.

[6] Inaccuracies. The appellant contends that the affidavit contained such inaccuracies that its integrity was destroyed and the warrant therefore should be voided. Miller v. State, 126 Ga.App. 847, 191 S.E.2d 883 (1972). Our review of the alleged inaccuracies leads us to concur with the trial court's assessment of them as "slight inaccuracies and errors." The lengthy and detailed warrant application was substantially correct, and we do not find the minor inaccuracies to be so material as to destroy the integrity of the affidavit or the validity of the warrant.

[7] Hearsay. The affidavit submitted with the warrant application contained averments of allegations relayed by (1) Gary Womack, a Medicaid

official in the Georgia Department of Human Resources, (2) practicing dentists who comprised the Peer Review Committee of the Georgia Dental Association, (3) Gene Matthews, a Special Investigator working for the Special Prosecutor in this case, and (4) two named GBI agents. The appellant is incorrect in contending that the affidavit was defective because it failed affirmatively to support the basis of knowledge and veracity of these hearsay declarants, as provided by Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and its progeny. Where the hearsay comes from a confidential informant--as likely as not a member of the criminal community and frequently one who is providing information in order to escape prosecution himself--the Aguilar

standards are readily applicable. E.g., Love v. State, 144 Ga.App. 728, 242 S.E.2d 278 (1978). But where the hearsay declarant is an identified interested citizen or, especially, an identified government official or police officer, the credibility is not as suspect and the analysis is not as stringent. People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971); Walker v. State, 196 So.2d 8 (Fla.App. 1967). In this case, the mere averments of who provided the information were enough to support a presumption of reliability, credibility, and accuracy (McNeal v. State, 133 Ga.App. 225(2), 211 S.E.2d 173 (1974); Davis v. State, 129 Ga.App. 158, 198 S.E.2d 913 (1973)), and the hearsay statements therefore may serve as the foundation for probable cause.

[8] B. Private Papers. There is no merit in the appellant's contention that the Medicaid records were not seizable because they were his private papers. If private papers constitute merely "tangible evidence" of the commission of a crime, they are not seizable. §3(e) Searches and Seizures Act, Ga.L.1966, pp. 567, 568 (Code Ann. §27-303(e)). But where the papers are the instrumentalities of the crime, they are properly seizable under §3(a) of that Act. Code Ann. §27-303(a). Here, the appellant was charged with making false claims for dental work not performed. The records seized were not just evidence of the claims; they were the instrumentalities of the claims; in essence, they were the claims. Thus, they were seizable under the valid

search warrant.

[9] 3. On separate cross examinations of two state witnesses, the appellant's attorney attempted to ask the witnesses whether they knew the state Medicaid program owed the appellant money. Both times these questions were objected to on grounds of irrelvancy and immateriality, and both times the objections were sustained. We think the evidence was relevant. The appellant was attempting to elicit testimony showing that the Medicaid program was fraught with administrative foul-ups, confusion, and billing inaccuracies, all of which would lead to an inference that the appellant had no intent to make claims for unperformed dental work, but had simply made mistakes in submitting valid claims. However, the

inference is a weak one indeed, and the excluded evidence, if introduced, would have been dwarfed by substantial evidence showing a contrary intent. Hence, we conclude that under the test of Johnson v. State, 238 Ga. 59, 230, S.E.2d 869 (1976), it is highly probable that this error did not contribute to the judgment, for under the voluminous evidence and facts here it is nearly inconceivable that this minimally persuasive evidence could have changed the outcome. The error therefore was harmless and does not require a new trial.

[10] 4. The opinion testimony of Dr. Charles Lewis, a dentist and Chairman of the Peer Review Committee, as to the comparative costs of two types of dental space maintainers, was clearly and demonstrably within his field of

expertise. This testimony was properly admitted.

[11] 5. We find no merit in the enumeration regarding the appellant's oral challenge to the order of names on the jury list. Code §59-803; McGinnis v. State, 135 Ga.App. 843(1), 219 S.E.2d 485 (1975).

[12] 6. After an in camera review of the state's files, the court granted the appellant's motion for disclosure of any exculpatory or helpful information, but only as to some of the contents. The remaining documents were placed under seal and both parties have requested that this court review the sealed documents in order to determine the propriety of the trial court's refusal to order them disclosed. We have, and we find that all of the documents are

clearly inculpatory and not remotely exculpatory.

[13] 7. It was not error to admit certain experimental evidence. Several of the charges against the appellant dealt with alleged false claims for pulp caps and tooth restorations. Introduced into evidence were X-rays of the teeth of patients on whom these operations had purportedly been performed. A dental expert thereafter testified as to an experiment he had conducted to determine whether the particular types of pulp caps and tooth restorations would show up in X-rays. The results of these experiments were admissible within the sound discretion of the trial judge, and we find no abuse of that discretion here. West

v. State, 200 Ga. 566(2), 37 S.E.2d 799 (1946).

[14] 8. Finally, there is no merit in the contention that the trial court erred in failing to charge on the effect of testimony concerning other related misconduct. First, we note that the trial court instructed the jury as to the limited purposes of such evidence before any such evidence was introduced. More importantly, at the conclusion of the charge to the jury no objections whatsover were voiced to the charge.

Judgment affirmed.

DEEN, P. J., and BANKE, J., concur.

COURT OF APPEALS

OF THE STATE OF GEORGIA

ATLANTA, April 28, 1978

The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:

55088. Sheldon M. Tuzman v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of
the State of Georgia
Clerk's Office,
Atlanta April 28, 1978

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Morgan Thomas CLERK

INDICTMENT COUNT NO.	MEDICAID RECIPIENT	TRANSCRIPT PAGES
2	Tajuane Denise Calhoun	472,476,497, 640-645,1182-1184, 1470
3	Roosevelt Coats, Jr.	472,476,497,645-649,980-981 1274,1473,1476, 1479,1688,1779
5	Jacqueline Cuyler	472,476,497,649-651,1184-1186,1480
6	Darlene Danzy	472,476,497,651-654,985-986, 1482-1483,1690, 1782
7	Alfonzo Denson	472,476,497,654-656,989-990,1275-1276,1360-1361, 1387,1482-1483

9	Angelina Evans	473,476,497,656-659,990-993,1188,1277,1484
10	Thelma Gordon	497,659-660,1486,1924-1925
11	Alisa Renee Greene	473,497,660-663,895-897,993-995,1189,1488-1490,1786
12	Pamela Greene	473,497,663-666,995,1190,1490,1697,1788
15	Cheryle Renee Hartry	473,476,497,666-668,862-869,1104-1106,1922,1926
16	Deborah Horton	473,476,497,498,668-672,996,997,1062-1066,1191-1193,1278-1283,1493,1497,1697-

		1698,1790
17	Stephanie Ivey	473,476,498,702-703,1107,1193,1498,1698
18	Donald Jackson	477,489,498,672-674,897-902,1066-1068,1193-1196,1284-1286,1499-1501,1699,1791,1923,1927
19	William Keith	473,477,498,674-676,1197-1198,1286-1287,1501-1503
23	Richard Mason	473,477,498,676-679,902-904,1504
24	Eddie Lee Miller	477,480,498,679-682,1108-1109,1195,1287-1288,1505

25	Jeanette Mitchell	477,498,682-683, 999-1001,1288-1291,1507
26	Julia Parks	477,498,683-685, 904,1109,1508
27	Sherry Parks	477,498,685-687, 1001-1002,1110, 1510
28	Dale Renfroe	473,499,687-690, 1111-1116,1148, 1155-1158,1199, 1200,1248-1250, 1291-1294,1511, 1795
29	Linda L. Shelton	474,477,499,690-692,905-906,1294, 1516
30	Della W. Smith	477,499,692-693, 1002-1006,1201, 1204,1295-1297,

		1518
32	Brenda J. Spencer	474,477,499,693-696,1006,1297, 1520,1704
33	Johnny Spencer	474,477,499,696-702,1007-1008, 1522,1704
34	Cary Stevens	474,477,499,704-705,1206,1298-1200,1524
35	Audrey Veal	474,477,499,706-708,1116-1120, 1527,1705,1795-1796
37	Timothy Earl West	474,477,499,708-710,1008-1012, 1020-1021,1208, 1209,1528
38	Alice William	474,477,499,710-711,716-718,906-

		907,,937-940,954, 1530,1705-1708, 1796-1798
39	Mattie M. Williams	477,499,711-714, 1012-1013,1300, 1534
41	Zeona Vernell Wright	477,500,714-715, 907-912,936,1090-1094,1534

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, June 9, 1978

Dear Sir:

Case No. 33816, Tuzman v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

IN THE SUPERIOR COURT OF BALDWIN COUNTY,

STATE OF GEORGIA

Criminal Action,
Case No. _____

DR. SHELDON MARVIN TUZMAN, *
*
Movant, *
*
VS. *
*
STATE OF GEORGIA, *
*
Respondent. *

MOTION FOR RETURN OF PROPERTY
AND TO SUPPRESS AS EVIDENCE
PROPERTY ILLEGALLY SEIZED

DR. SHELDON MARVIN TUZMAN (herein referred to as "movant") shows to the Court the following facts:

1.

On February 23, 1977, at night,

James T. Duff, III, assisted by Joseph H. Briley and Gene A. Matthews searched movant's office at 131 N. Jefferson Street, Milledgeville, Georgia and seized therefrom:

(a) Movant's files on certain of his dental patients and all contents of such files. The names of movant's patients whose files were so seized are set out in Attachment #1 of the Return on the Search Warrant attached hereto as Exhibit A.

(b) Certain articles described in Attachment #2 of said Return.

At the time of such search and seizure James T. Duff, III claimed to be a special agent of the Georgia Bureau of Investigation and Joseph H. Briley was District Attorney of the Ocmulgee

Circuit. Said James T. Duff, III claims to have made said search and seizure under authority of a search warrant issued on February 23, 1977 at 5:45 P.M. by Jospeh B. Duke, Judge of the Ocmulgee Circuit. A copy of said search warrant together with the return thereon is attached hereto as Exhibit A.

2.

Said search warrant was issued upon the affidavit and oral testimony of James T. Duff, III, a copy of said affidavit is attached hereto as Exhibit B. No record exists of such oral testimony.

(a) In said affidavit, it is stated that the property therein mentioned is subject to search and seizure

"as instruments and things which have been used in the commission of the offense" of Theft by Deception, Georgia Code 26-1803. This statement is untrue. Such property has never been used in the commission of any offense and affiant had no reason whatever to believe otherwise.

(b) In said affidavit, it is stated that the property therein mentioned "are tangible evidence of the crime of: Theft by Deception, Georgia Code 26-1803". This statement is untrue. Such property is not evidence of any crime and affiant had no reason to believe otherwise.

(c) In said affidavit, it is stated:

"According to treatment plan documents submitted by the said

Tuzman, he claimed to have completed the alleged dental services on each recipient as noted below. The said Tuzman was paid by the State of Georgia for said specific services on the date in each case listed below."

This statement is untrue. A "treatment plan document" is exactly what the name implies - a plan for treatment; and no claim was made by Tuzman that any work had been done at the time he submitted such documents except for such items of work for which dates of completion had been inserted by him in the column headed "Date Service Performed". If the State of Georgia paid Tuzman for any other item, it was a mistake of the State of Georgia.

(d) In said affidavit, it is

stated:

"The above Peer Review Committee dentists reported on December 16, 1976, to Special Agent Duff and Special Investigator Matthews that they found that in regard to each recipient above mentioned that certain items of work for which the said Dr. Tuzman had made claim for payment had in fact not been done."

This is untrue. If said committee made such report, they were misinformed as to the items for which the State of Georgia has paid Dr. Tuzman or as to the items of work performed by Dr. Tuzman. If said Peer Review Committee observed anything suggesting that any item of work paid for by the State of Georgia was not done, such was due to

said committee being misinformed, or to changes in the condition of the patient's mouth occurring between the time such work was done and the time of the audit, or to bona fide mistakes by the State of Georgia or by Dr. Tuzman and his staff in keeping records.

(e) In said affidavit, it is stated:

> "On December 16, 1976, Dr. Larry Landers advised Special Agent Duff and Special Investigator Matthews that recipient, WILLIE MAE AUSTIN, stated to him that Dr. Tuzman charged her for dental work which Dr. Landers noted was the same work for which Dr. Tuzman made claims under the Medicaid Program."

This is untrue. If Dr. Landers so

advised Duff and Matthews, he was misinformed. Dr. Tuzman did not charge Willie Mae Austin for any work for which he was paid by the State of Georgia; and, if Willie Mae Austin made any such statement to Dr. Larry Landers, she lied.

(f) In said affidavit, it is stated:

> "On December 16, 1976, Dr. Pete Gaines, Dr. Patrick G. Allen and Dr. Larry Landers advised Special Agent Duff and Special Investigator Matthews that recipient, JACQUELINE BROOKS, advised them that she was charged by Dr. Tuzman and paid him in excess of $700.00 for work for which the said Peer Review dentists noted that Dr. Tuzman made Medicaid claims".

This is untrue. If Gaines, Allen and Landers so advised Duff and Matthews, they were misinformed. Dr. Tuzman did not charge, and Jacqueline Brooks did not pay Dr. Tuzman any amount for work for which Dr. Tuzman was paid by the State of Georgia; and, if Jacqueline Brooks made any such statement to the said Peer Review dentist she lied. Furthermore, if said Peer Review dentist told Duff and Matthews that Tuzman had been paid by the State of Georgia for work which he had charged to and been paid by Jacqueline Brooks, they were misinformed.

(g) In said affidavit, it is stated:

"On December 16, 1976, Dr. Charles J. Lewis advised Special Agent Duff and Special Investigator

Matthews that recipient, GEORGIA ANN BROWN, stated to him that Dr. Tuzman charged her for work which Dr. Lewis noted was the basis of a Medicaid claim by Dr. Tuzman."

This is untrue. If Dr. Lewis so advised Duff and Matthews, he was misinformed. Dr. Tuzman did not charge Georgia Ann Brown for any work for which he was paid by the State of Georgia; and, if said Georgia Ann Brown made any such statement to Dr. Charles J. Lewis, she lied.

(h) In said affidavit, it is stated in connection with a conversation between Matthews and Tuzman on February 14, 1977:

"...Dr. Tuzman requested Mr. Matthews contact him the following day so that he could check his

schedule and his files and stated at the time that some of his Medicaid records were at his home."

This is untrue. Dr. Tuzman said nothing about checking his files and he made no statement whatever with reference to his Medicaid records.

(i) In said affidavit, it is stated that on February 15, 1977, Special Investigator Matthews contacted Dr. Tuzman and the latter declined to be interviewed and in doing so did not indicate that his records had been moved. This is untrue. Dr. Tuzman did not decline to be interviewed. He requested a copy of the Peer Review Committee Report of the December 16, 1976 Audit before any such interview so that he would have an opportunity of

refreshing his recollection with respect to the matters reported in such report; and he declined to be interviewed until he was allowed to so review such report and refresh his recollection. Also, no inquiry was made of Dr. Tuzman as to his records and Dr. Tuzman made no comment whatever regarding his records.

3.

Neither movant nor anyone else has ever been charged by accusation, indictment or special presentment with the crime of theft by deception, Georgia Code Section 26-1803, or any other crime connected with any matter set out in said affidavit. However, if any such charges were made, the Superior Court of Baldwin County, Georgia would have jurisdiction to try the same.

4.

All records seized are private papers which have always been maintained and kept by Dr. Tuzman in his office for use in treating his patients, and Dr. Tuzman is severly handicapped in properly treating his dental patients whose records have been seized.

5.

Said warrant was illegally executed in that property whose seizure was not authorized thereby was in fact seized namely:

(a) The files enumerated in Attachment #1 attached to the return entered upon said warrant;

(b) The contents of said files other than examination and treatment records, including X-rays, and payment

records; and

(c) The articles enumerated in Attachment #2 attached to the return entered upon said warrant.

6.

Said warrant was illegally executed in that the information supporting probable cause contained falsehoods to the extent that the integrity of such information is destroyed.

7.

Said search and seizure was illegal because the warrant is insufficient on its face in the following respects:

(a) The dental appliances ordered seized thereby were not sufficiently identified in that the names of the patients whose dental appliances were

to be seized were not set out in said warrant.

(b) Said warrant ordered seizure as tangible evidence of the crime things expressly exempt from seizure as such tangible evidence, namely, private papers of a person; such private papers being the records mentioned in said warrant.

(c) Said warrant ordered seizure of examination and treatment records including X-rays, of certain patients therein set out without making a finding of probable cause to believe that such records were tangible evidence of the commission of the crime or that such records were designed or intended for use or had been used in the commission of the crime.

(d) Said warrant ordered seizure

of payment records of certain patients therein set out without making a finding of probable cause to believe that such records were tangible evidence of the commission of the crime or that such records were designed or intended for use or had been used in the commission of the crime.

(e) Said warrant ordered seizure of "dental appliances that had not been delivered to certian patients" without making a finding of probable cause to believe that such dental appliances were tangible evidence of the commission of the crime or that such dental appliances were designed or intended for use or had been used in the commission of the crime.

8.

There was not probable cause for the issuance of said warrant in that there was no sufficient showing that probable cause existed to believe that:

(a) The examination and treatment records, including X-rays, were tangible evidence of the commission of the alleged crime or were designed or intended for use or had been used in the commission of the alleged offense.

(b) The payment records were tangible evidence of the commission of the alleged crime or were designed or intended for use or had been used in the commission of the alleged offense.

(c) The dental appliances were tangible evidence of the commission of the alleged crime or were designed or intended for use or had been used in the commission of the alleged offense.

(d) The crime by Theft By Deception, Georgia Code 26-1803, is being or had been committed.

(e) Gary D. Womack was credible or the information furnished by him to James T. Duff, III was reliable.

(f) Dr. Patrick G. Allen was credible or the information furnished by him to James T. Duff, III was reliable.

(g) Dr. Larry Landers was credible or the information furnished by him to James T. Duff, III was reliable.

(h) Dr. Charles J. Lewis was credible or the information furnished by him to James T. Duff, III was reliable.

(i) Dr. Pete Gaines was credible or the information furnished by him to James T. Duff, III was reliable.

(j) Dr. N. T. Ivey was credible or the information furnished by him to

James T. Duff, III was reliable.

(k) Dr. R. Arch McEwen was credible or the information furnished by him to James T. Duff, III was reliable.

(l) Willie Mae Austin was credible or the information furnished by her to Dr. Larry Landers was reliable.

(m) Jacqueline Brooks was credible or the information furnished by her to Dr. Pete Gaines, Dr. Patrick G. Allen and Dr. Larry Landers was reliable.

(n) Georgia Ann Brown was credible or the information furnished by her to Dr. Charles J. Lewis was reliable.

(o) The information set out in the 5th paragraph of the fourth page of the affidavit of James T. Duff, III was reliable or had been obtained from a credible person.

(p) Prosecution for the alleged

crime was not barred by the limitation of prosecution set out in Georgia Code Annotated, Section 26-502.

(q) The information supporting probable cause contains falsehoods to the extent that the integrity of such information is destroyed.

9.

There was not probable cause for the issuance of said warrant in that the information supporting probable cause was stale in so far as such information related to probable cause to believe that:

(a) Any crime had been committed;

(b) Any crime had been committed in connection with dental work by Dr. Tuzman shown by said affidavit to have been audited on March 28, 1975;

(c) Any crime had been committed in connection with dental work by Dr. Tuzman shown by said affidavit to have been audited December 16, 1976;

(d) The information supplied to James T. Duff, III by Gary D. Womack;

(e) The information furnished to James T. Duff, III, by Dr. Patrick G. Allen and Dr. Larry Landers with respect to the March 28, 1975 audit;

(f) The information furnished to James T. Duff, III by Dr. Patrick G. Allen and Dr. Larry Landers with respect to the December 16, 1976 audit;

(g) The information that was reported on December 16, 1976 to Special Agent Duff and Special Investigator Matthews by the Peer Review Committee dentist;

(h) The information furnished by

Dr. Larry Landers to Duff and Matthews relating to Willie Mae Austin;

(i) The information furnished by Dr. Pete Gaines, Dr. Patrick S. Allen and Dr. Larry Landers to Duff and Matthews relating to Jacqueline Brooks;

(j) The information furnished to Duff and Matthews by Dr. Charles J. Lewis with respect to Georgia Ann Brown;

(k) The information furnished by W. R. Wilkinson;

(l) The examination and treatment records, including X-rays, sought had been used in the commission of the alleged offense or were tangible evidence of the alleged crime;

(m) The payment records sought had been used in the commission of the alleged offense or were tangible

evidence of the alleged crime; and

(n) The dental appliances sought had been used in the commission of the alleged offense or were tangible evidence of the alleged crime.

10.

On the night that said warrant was executed, James T. Duff, III and Gene A. Matthews came to movant's home where said Duff demanded that movant go to his office, unlock the door and permit Duff to enter to execute the search and seizure under the warrant. At that time Duff stated that if movant did not do so, Duff would knock down the door to movant's office. Under this threat and to avoid having his office door knocked down, movant met Duff, Briley and Matthews at his office, unlocked

the door, and they entered his office and commenced the search. Duff, Briley and Matthews then demanded that movant point out the location in his office of the records for which the search was being conducted. In response to this demand and to avoid a general search of his entire office, movant pointed out a small room and indicated that the records sought were in it. Duff, Briley and Matthews then demanded that movant point out the location in his office of the undelivered dental appliances for all his patients listed in the warrant. At first, movant declined to do so, whereupon Briley instructed the officers to get a bag and throw into it every dental appliance in the office. Under this threat and to avoid the loss of all dental appliances in

his office, movant pointed out the dental appliances listed in Attachment #2 of the return on the warrant. Everything which movant did in connection with said search and seizure was done under protest and with a specific reservation by movant of all his rights.

11.

(a) Said warrant was illegally executed in that it was used to compel movant to give evidence against himself in violation of Amendment Five of the United States Constitution and as a consequence the execution thereof constituted an unreasonable search and seizure in violation of movant's rights under Amendemnt Four of the United States Constitution. Said Amendment Five reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Said Amendment Four reads as follows:

"The right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The evidence which movant was thereby compelled to give against himself as set out in paragraph 12 hereof lead to the discovery and seizure of the files and articles enumerated in Attachments #1 and #2 of the return on said warrant. Therefore, said files and articles are the fruits of an unlawful search and seizure.

12.

Said warrant was illegally executed in that it was used to compel movant to give testimony tending to criminate himself in violation of Paragraph VI of Section I of Article I of the Constitution of the State of Georgia and as a consequence the execution thereof constituted an unreasonable search and seizure in violation of movant's rights under Paragraph XVI of Section I of Article I of the Constitution of the State of Georgia. Said Paragraph VI reads as follows:

"No person shall be compelled to give testimony tending in any manner to criminate himself."

Said Paragraph XVI reads as follows:

"The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

The testimony tending to incriminate movant which movant was compelled to give as set out in paragraph 12 hereof lead to the discovery and seizure of the files and articles enumerated in Attachments #1 and #2 of the return on said warrant. Therefore, said files and articles are the fruits of an unlawful search and seizure.

Wherefore, movant moves the court that:

(a) An order be entered immediately forbidding the use of the property seized in the execution of said search warrant or of copies thereof for any purpose whatever until the motion for return and suppression herein made are heard and determined; and

(b) After hearing, an order be entered requiring that all property seized in the execution of said search warrant together with all copies thereof which may have been made be returned to movant and suppressing as evidence for use in any judicial proceeding all things obtained by the search and seizure herein set out or which may be the fruits of such search and seizure.

/s/ G. L. Dickens, Jr.
(G. L. Dickens, Jr.)

ATTORNEY FOR MOVANT

Address:

P. O. Box 460

140 West Washington Street

Milledgeville, Georgia 31061

Telephone: (912) 452-0595

RULE NISI

The within motions read and considered.

It is ordered that neither the property seized in the execution of said search warrant nor copies thereof be used for any purpose whatever until the motions for return and suppression therein made are heard and determined.

It is further ordered that the State of Georgia show cause before me in the courthouse of Baldwin County, Georgia at 11:00 o'clock, A .M., on the 31st day of March, 1977, why an order for return and suppression as evidence of the property seized should not be entered in accord-

ance with said motions.

So ordered, this 16th day of March, 1977.

/s/ George L. Jackson
Judge, Superior Court
of Baldwin County,
Georgia.

GEORGIA, BALDWIN COUNTY.

I, G. L. Dickens, Jr., attorney for movant do hereby certify that I have this day served the within and foregoing motion and rule nisi upon the State of Georgia by mailing a true copy of the same to the Honorable Jospeh H. Briley, District Attorney of the Ocmulgee Circuit addressed to him as follows:

Mr. Joseph H. Briley, District Attorney
P. O. Box 361
Gray, Georgia 31032

This 16th day of March, 1977.

/s/ G. L. Dickens, Jr.
(G. L. Dickens, Jr.)
ATTORNEY FOR MOVANT

MR. DICKENS: Your Honor, I would like to make certain motions in regard to the search warrant outside of the presence of the jury.

THE COURT: Ladies and gentlemen of the jury, please retire from the courtoom until you are sent; probably 15 or 20 minutes.

(Evidence as to Search Warrant)
(MOTION OUT OF JURY'S PRESENCE AND HEARING)

MR. DICKENS: May it please the Court, at this time I would like to perfect the record. Of course, we had a hearing on the search warrant and, of course, Your Honor has overruled the objections to it and our motion to suppress the evidence and to require

the property returned.

Now, I do not wish - of course, we have taken exception and we have also filed an appeal on this ruling; and we strenuously object to any testimony about search warrant or about anything which was obtained by the search warrant on the same grounds that we set forth in our motions to suppress.

And I don't think it's necessary for me, since it's all in the record, to repeat those grounds since they are all in the record. But we respectfully insist that the motion to suppress should have been granted and that it would be error here to admit any testimony about such warrant or anything which was obtained by that means, because of the reasons stated in the motion and supported by the evidence in

previous hearing.

And I would like to perfect that motion and object to this evidence.

THE COURT: All right sir, you are adopting the motion and also the evidence by reference thereto?

MR. DICKENS: Yes sir.

THE COURT: I adhere to my former ruling.

MR. DICKENS: Your Honor, of course, I don't want to interrupt the progress of the trial; and with the Court's permission and Mr. England's agreement, I would like to stipulate that this will continue as an objection each time that such evidence is introduced rather than jumping up and down and objecting each time.

THE COURT: If there is no objection, it will be a continuing objection.

MR. ENGLAND: I have no objection, Your Honor.

THE COURT: In reference to the search warrant or the fruits thereof. All right, I adhere to my former ruling. We will take about a 15 minute recess.

(Opening Statement: STATE)

MR. DICKENS: Your Honor, before we go into these things I have certain motions which I would like to make out of the presence of the jury.

THE COURT: All right, he wants to be heard outside of the presence of the jury. Mr. England, if you will sit down just a minute.

Ladies and gentlemen, we are about to take a 20-minute recess. During this recess and all other recesses, you will not be kept together, as I have previously instructed you. However, please do not discuss this case among yourselves nor permit anyone else to discuss it with you; do not look at any newspaper or television or listen to any radio accounts of this trial.

As I previously stated to you, if anyone attempts to talk to you, I wish to be notified of that fact; and do not read any newspaper account or listen to television or radio. To do so might invite a mistrial in this case. Be back in the jury box at a quarter after 3:00, and all the jurors leave the courtroom.

(JURORS WITHDRAWN FROM COURTROOM)

DEFENSE MOTION

THE COURT: All right, Mr. Dickens.

MR. DICKENS: Your Honor, if I understood Mr. England's comments just before I asked that the jury be excused, he had indicated that in the Smith case there were certain things that he was proposing to prove with regard to the Smith case, for which this Defendant was not indicted.

And, of course, we have no knowledge or no prior notice whatsoever with regard to anything except that which is in the indictment with regard to this case. And, of course, we think it would be highly prejudicial and improper for the State at any time to endeavor to prove anything with regard to Count 31, the Smith count, or any other count, which is not specifically in the indictment or that count which was given to us earlier.

In the first place, we would not have had an opportunity to investigate it; we would not have been given an opportunity to prepare to defend against it.

But even more so, there are, I believe, certain other things which will relate to it. I believe that, if

the State is permitted to go in and prove other things that are not in the indictment, it will in effect violate this Defendant's right to a fair trial, which is guaranteed under the Due Process clauses of both the Georgia Constitution and the U. S. Constitution.

Of course, the only purpose in that would be to try to prejudice fair minded jurors against this Defendant.

Also, I believe that proof of this nature would also be violative of the right to require proof beyond a reasonable doubt. This is a Constitutional guarantee which has been guaranteed by the United States Constitution, Amendment 14, the due process clause; and there is also similar due process clause in the Georgia Constitution, Code Section 1-815.

I believe that this principle has been recognized in Re Winship, 397 U.S. 358. Now, as I understand it, this case by the U. S. Supreme Court, in effect, has held that it violates the right - that this case holds that the U. S. Constitution requires as a part of due process that the State prove any charge beyond a reasonable doubt.

When you are permitting proof of other alleged offenses to come in, that has the effect of lessening the requirement of separate proof of intent for the particular crime for which the defendant is being charged.

And we respectfully urge the Court to instruct counsel that he cannot go into this matter.

THE COURT: Do you want to be heard, Mr. England?

MR. ENGLAND: Yes sir, Your Honor please. Your Honor please, what I propose to the Court to do is to offer evidence under the well known exception to the relevancy rule because of a logical connection.

I would propose to offer to the jury two categories of this kind of evidence: one, the one I was just fixing to go into, on a particular count in the indictment, where the truth of the matter is that I didn't understand fully the record made by the peer review dentists about the discrepancies on that particular recipient; and, therefore, did not put it into the indictment, though the same information is on the copy of the data furnished to counsel, the same information that I had and he's had it for a long time.

And I would propose to offer that because of the logical connection with that case and with the entire case, for that count and the entire case, to show intent, scheme, motive, bent of mind, course of conduct and modus operandi.

I know the Court, of course, is well familiar with numerous decisions of the State on the point and I have several here that are close to our situation here, which I will be glad to cite to the Court, if the Court wants to hear them. I think the Court has read all of them.

In addition, if Your Honor please, I think it would be appropriate, while the jury is out, to go ahead and deal with this. As the Court well knows, we've had numerous colloquy, the Court and counsel and I, in the presence of

the jurors before they were selected about the fact that there are 41 counts in the indictment; and they're only trying him on 11. This has been reiterated to them each time the jury has been around or juror.

And I certainly would like to, and I think the law certainly justifies it, in addition, offer evidence on these 30 barred counts, that Your Honor has barred by being misdemeanors; and has barred them on the ground that at least somebody from the State knew about these offenses more than two years before the indictment.

I would like to offer those and I have cases on that, which I am sure the Court is familiar with. I would like to offer evidence of those because of logical connection, to show scheme,

motive, bent of mind, course of conduct and modus operandi in the case.

THE COURT: Anything further, Mr. Dickens?

MR. DICKENS: Your Honor, I was not addressing myself to that issue at this time because it really hasn't arisen at this point. But the one that I was addressing myself to was the particular count where he was trying to go into other things with regard to this particular patient.

Of course, at the proper time I intend to make substantial objection to exploring or introducing evidence of any of the counts relating to any of the misdemeanors.

THE COURT: Well, I assume that he's planning to attempt to offer testimony of the 30 counts which the

Court has barred?

MR. ENGLAND: Yes sir.

THE COURT: Because I heard him myself make the statement that he was last week.

MR. DICKENS: Yes sir.

MR. ENGLAND: I believe the Court also asked me Monday and I said the same thing to the Court.

THE COURT: Yes sir, and defense counsel was present. So, I know he's going to plan to do that.

MR. DICKENS: Your Honor, at this time then, I can, of course, go ahead and state my objections more fully with regard to that.

THE COURT: Yes sir, because I imagine it will come up in a few minutes.

MR. DICKENS: Yes sir. Just one moment and let me get myself organized

here.

Your Honor, I would object to the admission of any testimony which relates to the counts which have been stricken or to which the plea in bar has been sustained, on the ground that the admission of that evidence would be in violation of Code Section 38-201 and 38-202, of the Code of Georgia.

38-201 reads: "The evidence must relate to the question being tried by the jury and to bear upon, directly or indirectly. Irreleveant matter should be excluded."

And then 38-202 reads: "The general character of the parties and especially their conduct in other transactions are irrelevant matters, unless the nature of the action involves such character and renders necessary or

proper the investigation of the conduct."

Now, I believe that those are or that is the general rule which would have the effect of excluding this.

Now, we have here where the plea in bar has been sustained to these counts, and I recognize that there have been certain exceptions which have been carved into this principle for certain matters, and I will deal with that shortly.

It is our position, first, that the exceptions do not apply; but, if they did apply, that the State would have to first make out a prima facie showing of guilt in the misdemeanor counts before the Court outside of the jury's presence, before permitting the jury to hear it. Otherwise, if they

heard it and then failed to make out the case of guilt - when I said prima facie guilt, case of guilt, I mean guilt beyond a reasonable doubt; and, if they undertook to introduce this evidence and then failed to make out a case of guilt, then of course we would have to move for a mistrial; and, of course, all of the delay which would be attendant to that.

Now, this attempt to bring in this type of evidence is really nothing but an attempt to boot-strap proof of intent. In other words, it's a question where the State has the burden of proving intent and so, they are attempting to bring in other evidence for the purpose of boot-strapping intent.

Now, the Georgia cases have been in a state of turmoil on this issue

since really beginning in 1952. Now, in 1952 the State Supreme Court decided the case of Bacon versus The State, which is 209 Ga. 261; and following that the Court of Appeals decided Davis v. The State, 115 Ga. App. 338; in which they, in effect, said that these exceptions which had been carved out before 1952, that is the Bacon decision, that they were a very doubtful precedent; and in that case they have begun to restrict and cut down on the exceptions which have been carved into this principle of law.

And in Sloan versus The State, which is another Court of Appeals decision, in 115 Ga. App. 177, there was a dissent in which the Court of Appeals split as to exactly what the state of the law is in this area.

And, as I understand it, these are the latest cases which would be definitive. Now, I am aware of the fact that there are cases which do relate to this principle which are older than this which have held in Georgia in some instances that the evidence would be admissible.

But now, there are certain things which have not yet been passed upon by the Georgia courts, and which we wish - upon which we wish to base our exception and objection to the admission of this evidence, and they are all constitutional issues, I believe; and with the Court's permission, I would like to specify the constitutional provisions to which I allude and then, of course, complete my exceptions.

In Article 5 of the United States

Constitution, which appears in Georgia Code 1-805, it is provided:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor to be deprived of life, liberty or property without due process of law; nor shall property be taken for public purposes without compensation."

In this regard, I am particularly

calling the Court's attention to the provision, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

That's the double jeopardy clause which I shall mention a few moments later.

And secondly, to the provision here, "without due process of law", which is another principle we will be relying upon.

Now, also in Article 6 of the U. S. Constitution, it is provided that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previ-

ously ascertained by laq, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining the witnesses in his favor; and to have the assistance of counsel in his defense."

And I particularly call your attention to the provision here to this, "to be informed of the nature and cause of the accusation", as it might relate to the attempt to expand on the indictment, the court which we were discussing when we broke and went into recess.

Now, in Article of the U. S. Constitution, it provides - and this provision appears in Georgia Code 1-1815 - "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of

the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

And this particular part of the U. S. Constitution I am particularly relying upon is the Due Process Clause that's mentioned therein, "without due process of law" and also the equal protection clause, which reads, "nor deny to any person within its jurisdiction the equal protection of the law."

Now, there are similar provisions in the Constitution of the State of

Georgia. I particularly call the Court's attention to Article 1, Section 1, Paragraph 1, appearing in Georgia Code 2-101, which reads:

"No person shall be deprived of life, liberty or property without due process of law."

Also, we call the Court's attention to Article 1, Section 1, paragraph 9, which reads:

"No person shall be deprived of the right to prosecute or defend his own cause in any of the courts in this State in person or by attorney, or both."

And also, I call Your Honor's attention to Article 1, Section 1, paragraph 11, which reads:

"Every person charged with an offense against the laws of this State

shall have the privilege and benefit of counsel, shall be furnished on demand with a copy of the accusation and a list of the witnesses on whose testimony the charge against him is founded, and shall have compulsory process to obtain testimony of his own witnesses; shall be confronted with the witnesses testifying against him and shall have a public and speedy trial by an impartial jury."

Also, Your Honor, we are relying upon Article 1, Section 1, paragraph 15, of the Georgia Constitution, reading:

"No person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in the case of mistrial."

Also, Your Honor, I call your attention and we rely upon Article 1, Section 2, paragraph 3, reading:

"Protection to person and property is the paramount duty of government and shall be impartial and complete."

That, of course, is essential the equal protection clause.

Now, applying these principles specifically, we contend that the admission of evidence of any of the counts which have been dismissed by sustaining the plea in bar, the admission of any evidence of them, would be in violation of the due process right, the due process clause of the U. S. Constitution, and also the due process clause of the Georgia Constitution, both of which I have just read aloud; and that is specifically in the

U. S. Constitution, Article 14, Section 1; and in the Georgia Constitution, I believe the due process is in Article 1, Section 1, paragraph 1.

Now, we believe that it would violate the due process clause right to a fair trial; that this would be evidence of prejudicial matters outside of the crime for which the Defendant is indicted, would deprive the Defendant of his right to a fair trial guaranteed by these provisions of law, evidence of an unrelated crime could turn the most fair minded jurors against the Defendant, who deserves a fair trial on the offense for which he is being tried.

Next, I would like to object to any evidence which would relate to the other counts to which the plea in bar has been sustained because we contend

that it would be in violation of the right of a citizen to equal protection of the law.

Now, in the U. S. Constitution that is guaranteed in Article 14, the last sentence of which I believe reads, "nor deny to any person within its jurisdiction equal protection of the law." And in the Georgia Constitution in Article 1, Section 2, paragraph 3, it says: "Protection to person and property is the paramount duty of government and shall be impartial and complete."

To allow the State to introduce evidence of alleged crimes, other than the offense that this Defendant is charged with, would deny the Defendant equal protection which the law guarantees to all citizens. It denies equal

protection by giving the person against whom the State introduces such evidence an unequal opportunity to obtain a fair trial due to the prejudice such evidence causes; and it causes an invidious discrimination against such defendant on an irrelevant criteria; namely, their past act not now named in the prosecution.

We also object to this evidence which would support any of the counts which have been dismissed by the plea in bar, on the ground that the same would be in violation of the right of citizens not to be put in jeopardy more than once; that is, the double jeopardy clause.

And, of course, in the State Constitution, that's in Article 1, Section 1, Paragraph 15: "No person

shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her motion for a new trial after conviction, or in the case of a mistrial."

And also, in the United States Constitution, that is in Article 5 and the pertinent part reads: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

We contend that the fact that we have been indicted and, in effect, the Court has dismissed the indictment in these cases by sustaining the plea in bar, in effect, has already put us in jeopardy on every one of these counts; and that to permit the testimony in support of these counts would be to put us against in jeopardy.

We also object to any evidence in support of the counts which have been disposed of by sustaining the plea in bar, in that to admit such evidence would violate the Defendant's right to require proof beyond a reasonable doubt.

And now, in that connection, Your Honor, I have a U. S. Supreme Court decision, which I think to be in point. And it's in the matter of Samuel Winship, 397 U. S. 358. It's also in 25 Lawyers Edition 2nd 368, which was decided in 1970. And here it held, quoting from the decision:

"On appeal, the Supreme Court of the United States reversed" - no, this is the headnote preceding it. "In an opinion by Justice Brannen expressing the view of five members of the Court,

it was held that the due process clause protected an accused in a criminal prosecution against conviction except upon proof beyond a reasonable doubt."

I would like to submit this case to the Court.

Now, completing my objection here, the U. S. Constitution has a due process provision, I believe in Article 5 and also in Article 14. In Article 5 the pertinent part reads:

"No person shall be held to answer for a capital or other infamous crime", and then it continues, "nor be deprived of life, liberty or property without due process of law."

Then, down in Article 14, it says again "nor shall any state deprive any person of life, liberty or property without due process of law."

Then, in the State Constitution in Article 1, Section 1, paragraph 1, it says "No person shall be deprived of life, liberty or property except by due process of law."

Now, if this evidence is admitted, it would violate the right of this Defendant to require proof beyond a reasonable doubt, because when evidence of other alleged offenses is admitted, it has the effect of lessening the requirement of separate proof of intent for the particular crime at issue. Each element of the crime must be proven beyond a reasonable doubt, and when intent is only shown by inference from other crimes, such intent has not been proved for the crime at issue. And, of course, the effect of this would be to attempt to lessen the

requirement of law that the proof beyond a reasonable doubt be made by the State of intent.

Now, continuing, Your Honor: The admission of the proposed evidence of the counts which have been stricken by sustaining the plea in bar would violate the right of this Defendant to defend his own cause in the courts of the State of Georgia, as they are guaranteed by the provisions of the Constitution of Georgia. I believe that would be Section 2-109:

"No person shall be deprived of the right to prosecute or defend his own cause in any court of this State in person or by attorney or by both" because to admit this evidence would, in effect, deprive him of any meaningful opportunity to defend himself of this

particular crime because this highly prejudicial evidence which would relate to other matters would cause irreparable damage to any defense and should, therefore, be excluded as violative of his right to defend himself in court as provided in this constitutional provision.

Also Your Honor, such evidence, if admitted, would violate the right of this Defendant to trial by an impartial jury. This is a right which is guaranteed by Amendment 6 of the U. S. Constitution, I believe, and by Article 1, Section 1, Paragraph 9 of the Georgia Constitution.

Now, a jury which is presented with evidence of other alleged offenses, for which he is not being tried, cannot be truly impartial; and, therefore, the

admission of such evidence would violate the guarantee of an impartial jury.

Also, the admission of any such evidence would be in violation of the Due Process Clause of both the Georgia Constitution and the U. S. Constitution, all of which I have previously read and pin-pointed, that is, the due process clauses, in that any rule of evidence, which would permit proof of other offenses, would have the effect of in effect silencing any defendant, whose own defense might require his own testimony; because, if you would permit testimony about other offenses, it would have the effect, if he should elect to take the stand, and would mean that he would be subject to cross-examination on all matters which have been discussed in evidence, including

the counts which have been dismissed as well as those which are being tried.

And this would, in effect, have the effect in many instances of silencing a defendant whose defense might require his own testimony, because of the bad effect which would come out of such cross-examination. This type of rule would require that the Defendant elect between testifying or having the damaging evidence admitted for impeachment purposes. And we certainly feel that any rule of law which would permit that would be unconstitutional, and would not be properly admitted.

THE COURT: Is that all, Mr. Dickens?

MR. DICKENS: Yes sir.

THE COURT: Of course, the grandfather case in this State is that of

The State versus Anjette Lyles, which has not been cited, in which the Court held that acts of a similar nature could be admitted into evidence, when the court admitted three previous murder cases that were almost identical to the fourth one that Mrs. Lyles was on trial for.

The Court is of the opinion that acts of a similar nature are admissible to show intent, bent of mind, course of conduct and so forth. I overrule the objection.

MR. DICKENS: Your Honor, so that we will know about perfecting or rather to, of course, preserve our objection, I don't want to be unnecessarily interposing objections and interrupting the progress of the trial. And with the Court's approval and consent of counsel,

I would like to just stipulate that this objection would be a continuing objection going to all of such evidence.

THE COURT: Any objection, Mr. England?

MR. ENGLAND: Your Honor, I have no objection at all. I think that's appropriate.

THE COURT: All right sir, let the stipulation be entered and I approve that. Of course now, the acts and conduct of similar nature will have to be proved by competent evidence, Mr. England, if you state that's what you intend to do.

MR. ENGLAND: Yes sir; and Your Honor please.

MR. ENGLAND: If Your Honor please, I believe this is No. 1, use of evidence of other discrepancies. We object to this as being an improper and incorrect statement of law. My understanding of the law is that on independent crimes - really, the Court has already ruled on a similar point. There's no requirement of proving the corpus delicti of any of these additional counts.

The independent crime evidence is offered simply as evidence that may tend to show intent, scheme, motive and so forth. And this charge would require the jury to set up an elaborate procedure and, in effect, to find the Defendant guilty of these misdemeanors before they can consider that evidence in

passing on the felonies.

And, of course, the Court admitted that evidence for the very purpose of aiding the jury, if they see fit to use it, in making their determination on the felony counts. I think that's a very improper statement of the law.

THE COURT: Do you want to be heard on No. 1, Mr. Dickens?

MR. DICKENS: Nothing other than to comment, Your Honor, I have stated it as we think the law to be; and we think the charge is appropriate and should be given.

THE COURT: Well, if I charge that, I don't believe there would be any necessity to put "testimony of other crimes in", if you limit it to intent on just the eleven, because I believe you can use the other to form

the intent or help form the intent on the eleven that he's actually indicted and on trial for.

MR. ENGLAND: That's the only reason they are relevant, really.

THE COURT: Yes sir, I refuse that charge.

REQUEST No. 1 REFUSED, as follows:

Defendant requests that the following charge be given to the jury:

I charge you that the Defendant is on trial for eleven (11) counts of theft by deception. Evidence has been introduced, however, as to 30 misdemeanor counts, for which the Defendant is not being tried.

I charge you that before you consider any of the evidence in regard to the 30 misdemeanor counts, you must first consider the 11 counts on which

the Defendant is being tried and satisfy yourselves beyond a reasonable doubt in regard to those counts that the Defendant failed to perform work for which he charged the State.

If you determine that the Defendant has failed to perform work for which he charged the State, in regard to any of the eleven counts for which he is being tried, you may then consider the evidence offered on the 30 misdemeanor counts to determine if he committed a crime in regard to any of these 30 counts for which he is not being tried.

Proof of an independent crime involves proof of each of the elements of a crime, which in the case of theft by deception means proof of obtaining property by any deceitful means or artful practice with the intention of

depriving the owner of said property.

Therefore, you must find from the evidence on each count not being tried intent to deprive, a deceitful means or artful practice and a deprivation of property before evidence on that count can be used on the issue of intent in the eleven counts on trial.

I further charge you that, even if you determine that an independent crime has been committed on one of the misdemeanor counts not on trial, that the weight of such evidence as to the issue of intent of the Defendant to defraud the State in regard to the eleven felony counts is solely a question for the jury to determine and is not conclusive evidence of intent to defraud.

IN THE SUPERIOR COURT OF BALDWIN

COUNTY, STATE OF GEORGIA

Criminal Action,

Case No. 29436

THE STATE, *
*
vs. *
*
SHELDON M. TUZMAN. *

CHARGE

USE OF EVIDENCE OF OTHER DISCREPANCIES

Defendant requests that the following charge be given to the jury:

"I charge you that the defendant is on trial for eleven (11) counts of theft by deception. Evidence has been introduced however, as to 30 misdemeanor counts for which the defendant is

not being tried. I charge you that before you consider <u>any</u> of the evidence in regard to the 30 misdemeanor counts you must first consider the 11 counts on which the defendant is being tried and satisfy yourselves beyond a reasonable doubt in regard to those counts that the defendant failed to perform work for which he charged the state. If you determine that the defendant has failed to perform work for which he charged the state in regard to any of the eleven counts for which he is being tried, you may then consider the evidence offered on the 30 misdemeanor counts to determine if he committed a <u>crime</u> in regard to any of these 30 counts for which he is not being tried. Proof of an independent crime involves proof of <u>each</u> of the elements of a crime, which

in the case of theft by deception means proof of obtaining property by any deceitful means or artful practice with the intention of depriving the owner of said property. Therefore, you must find from the evidence on each count not being tried intent to deprive, a deceitful means or artful practice and a deprivation of property before evidence on that count can be used on the issue of intent in the eleven counts on trial. I further charge you that even if you determine that an independent crime has been committed on one of the misdemeanor counts not on trial that the weight of such evidence as to the issue of intent of the defendant to defraud the State in regard to the eleven felony counts in solely a question for the jury to determine and is

not conclusive evidence of intent to defraud."

Respectfully submitted,

/s/ G. L. Dickens, Jr.
(G. L. Dickens, Jr.)

Attorney for Defendant

French v. State, 237 Ga. 620, 229 S.E.2d 410 (1976) at 229 S.E.2d 411.

Ga. Code Ann. Section 26-1803(a)

Probation for First Offender

STATE OF GEORGIA, BALDWIN COUNTY

State of Georgia	)	Indictment in
	)	
	)	Superior Court
	)	
vs.	)	Case No. 29436
	)	
	)	For Theft By
	)	
	)	Deception
	)	
Sheldon M. Tuzman	)	Count No. 4

The above named defendant having pled not guilty but being found guilty of the above stated offense, and the defendant being brought before the Bar of the Court, and showing that he has not been previously convicted of a felony;

IT IS THEREUPON, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the adjudication of guilt of the said

Sheldon M. Tuzman be and hereby is deferred and suspended in accordance with the provisions of Georgia Law, 1968, Page 324 through 326, upon the express conditions that said defendant shall, for a term of five years abide by the following rules of probation; (1) pay into Court a fine of two thousand dollars, said fine to be paid to the Probation Officer of said County as required by said probation officer; (2) immediately secure and maintain regular employment; (3) immediately report to said probation officer any change in home address or employment; (4) not leave said state without the permission of the Court; (5) not drink intoxicating liquors or beverages, gamble, or loiter in or about places of bad reputation, or indulge in any unlawful, disrespect-

ful or disorderly conduct or habits; (6) report to said Probation Officer periodically as required by said probation officer; (7) comply with such other rules and regulations pertaining to the conduct of probationers under his supervision as may be set forth by said Probation Officer, all until the further order of the Court.

It is further ordered that the defendant pay restitution in the amount of $241.00 to the Baldwin County Probation Officer. It is also ordered that the defendant pay restitution to Baldwin County, Georgia, for all expenses incurred in the trial of this case.

During the term of the aforesaid sentence, should the said defendant fail to meet any of the conditions upon

which said sentence is probated, the said defendant shall be immediately brought before this Court to show cause why his guilt should not be adjudicated and sentence imposed according to law.

Dated this 1st day of June, 1977.

/s/ George L. Jackson
Judge Superior Courts,
Ocmulgee Judicial Circuit

Clerk's Office Superior Court, Baldwin County, Georgia.

I certify that the foregoing is a full and true copy of the sentence passed in the above stated case as the same appears from the minutes of said Court and from the original record now of file in said office.

Witness my official signature, in

the City of Milledgeville, Georgia, on this the 1st day of June, 19 77.

/s/ Mary G. Wyatt
Clerk Superior Court

Baldwin County, Georgia

I certify that I have fully read and explained and delivered a certified copy of this sentence to the herein named person. This 1st day of June, 19 77.

/s/ William L. Waller, Jr.
Probation Officer

I have read the above sentence and had it fully explained to me and understand the provisions of this sentence and have received a certified

copy of this sentence. This 1st day of June, 19 77.

/s/Dr. Sheldon M. Tuzman
Probationer

Probation for First Offender

STATE OF GEORGIA, BALDWIN COUNTY

State of Georgia	)	Indictment in
	)	
	)	Superior Court
	)	
vs.	)	Case No. 29436
	)	
	)	For Theft By
	)	
	)	Deception
	)	
Sheldon M. Tuzman	)	Count No. 8

The above named defendant having pled not guilty but being found guilty of the above stated offense, and the defendant being brought before the Bar of the Court, and showing that he has not been previously convicted of a felony;

IT IS THEREUPON, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that

the adjudication of guilt of the said Sheldon M. Tuzman be and hereby is deferred and suspended in accordance with the provisions of Georgia Law, 1968, Page 324 through 326, upon the express conditions that said defendant shall, for a term of five years abide by the following rules of probation; (1) pay into Court a fine of two thousand dollars, said fine to be paid to the Probation Officer of said County as required by said probation officer; (2) immediately secure and maintain regular employment; (3) immediately report to said probation officer any change in home address or employment; (4) not leave said state without the permission of the Court; (5) not drink intoxicating liquors or beverages, gamble, or loiter in or about places of bad reputation,

or indulge in any unlawful, disrespectful or disorderly conduct or habits; (6) report to said Probation Officer periodically as required by said probation officer; (7) comply with such other rules and regulations pertaining to the conduct of probationers under his by said Probation Officer, all until the further order of the Court.

It is further ordered that the defendant pay restitution in the amount of $125.00 to the Baldwin County Probation Officer. It is also ordered that the defendant pay restitution to Baldwin County, Georgia, for all expenses incurred in the trial of this case.

This sentence is to run concurrently with the sentence in Case No. 29436, Count #4, this day imposed by

by the Court on the defendant.

During the term of the aforesaid sentence, should the said defendant fail to meet any of the conditions upor which said sentence is probated, the said defendant shall be immediately brought before this Court to show cause why his guilt should not be adjudicated and sentence imposed according to law.

Dated this 1st day of June, 1977.

/s/ George L. Jackson
Judge Superior Courts,
Ocmulgee Judicial Circui

Clerk's Office Superior Court, Baldwin County, Georgia.

I certify that the foregoing is a full and true copy of the sentence passed in the above stated case as the same appears from the minutes of said

Court and from the original record now of file in said office.

Witness my official signature, in the City of Milledgeville, Georgia, on this the 1st day of June, 19 77.

/s/ Mary G. Wyatt
Clerk Superior Court

Baldwin County, Georgia

I certify that I have fully read and explained and delivered a certified copy of this sentence to the herein named person. This 1st day of June, 19 77.

/s/ William L. Waller, Jr.
Probation Officer

I have read the above sentence and had it fully explained to me and

understand the provisions of this sentence and have received a certified copy of this sentence. This 1st day of June, 19 77.

/s/ Dr. Sheldon M. Tuzman
Probationer

Probation for First Offender

STATE OF GEORGIA, BALDWIN COUNTY

State of Georgia	)	Indictment in
	)	
	)	Superior Court
	)	
vs.	)	Case No. 29436
	)	
	)	For Theft By
	)	
	)	Deception
	)	
Sheldon M. Tuzman	)	Count No. 22

The above named defendant having pled not guilty but being found guilty of the above stated offense, and the defendant being brought before the Bar of the Court, and showing that he has not been previously convicted of a felony;

IT IS THEREUPON, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that

the adjudication of guilt of the said Sheldon M. Tuzman be and hereby is deferred and suspended in accordance with the provisions of Georgia Law, 1968, Page 324 through 326, upon the express conditions that said defendant shall, for a term of five years abide by the following rules of probation; (1) pay into Court a fine of two thousand dollars, said fine to be paid to the Probation Officer of said County as required by said probation officer; (2) immediately secure and maintain regular employment; (3) immediately report to said probation officer any change in home address or employment; (4) not leave said state without the permission of the Court; (5) not drink intoxicating liquors or beverages, gamble, or loiter in or about places of bad reputation,

or indulge in any unlawful, disrespectful or disorderly conduct or habits; (6) report to said Probation Officer periodically as required by said probation officer; (7) comply with such other rules and regulations pertaining to the conduct of probationers under his supervision as may be set forth by said Probation Officer, all until the further order of the Court.

It is further ordered that the defendant pay restitution in the amount of $143.00 to the Baldwin County Probation Officer.

This sentence is to run concurrently with the sentence in Case No. 29436, Count #4, this day imposed by the Court on the defendant.

During the term of the aforesaid sentence, should the said defendant

fail to meet any of the conditions upon which said sentence is probated, the said defendant shall be immediately brought before this Court to show cause why his guilt should not be adjudicated and sentence imposed according to law.

Dated this 1st day of June, 1977.

/s/ George L. Jackson
Judge Superior Courts,
Ocmulgee Judicial Circuit

Clerk's Office Superior Court, Baldwin County, Georgia.

I certify that the foregoing is a full and true copy of the sentence passed in the above stated case as the same appears from the minutes of said Court and from the original record now of file in said office.

Witness my official signature, in the City of Milledgeville, Georgia, on this the 1st day of June, 19 77.

/s/ Mary G. Wyatt
Clerk Superior Court
Baldwin County, Georgia

I certify that I have fully read and explained and delivered a certified copy of this sentence to the herein named person. This 1st day of June, 19 77.

/s/ William L. Waller, Jr.
Probation Officer

I have read the above sentence and had it fully explained to me and

understand the provisions of this sentence and have received a certified copy of this sentence. This 1st day of June, 19 77.

/s/ Dr. Sheldon M. Tuzman
Probationer

Supreme Court, U. S.
FILED
OCT 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-380

SHELDON M. TUZMAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
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October, 1978

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IN THE

Supreme Court of the United States

October Term, 1978

No. _____

SHELDON M. TUZMAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

QUESTIONS PRESENTED

1.

Whether the admission of evidence of independent crimes used as proof of Petitioner's guilty knowledge, scheme, motive and intent violates his rights to a fair and impartial trial and jury, to equal protection, not to be placed twice in jeopardy for one offense, to have his guilt proved by the State, and to defend his cause before the courts.

2.

Whether a search warrant that was based upon sub-

stantial and ample probable cause in the form of an affidavit and considerable oral testimony violates Petitioner's right to be safe from unreasonable searches and seizures.

PART TWO

STATEMENT OF THE CASE

For several years, Georgia medicaid recipients received dental services from Petitioner, Dr. Sheldon M. Tuzman. After discrepancies of medicaid claims for which Petitioner had been paid came to the attention of the State, extensive investigation of his participation in the medicaid program took place. On the basis of the investigation, the State sought two search warrants dated February 23, 1977.

The thrust of the search warrants and affidavit is that Petitioner was suspected of using examination and treatment records, x-rays, payment records and dental appliances as instrumentalities and tangible evidence of crimes of theft by deception. This evidence was based on information of claims and payments from a named State official of the Georgia Department of Human Resources, whose name was set forth in the affidavit.

The evidence was further based upon professional examinations of numerous patients of Petitioner by named members of a Peer Review Committee of the Georgia Dental Association.

Attached to the affidavit and incorporated therein was Petitioner's Medicaid Agreement wherein he agreed to keep such records as those sought. The issuing judge considered this along with the other evidence.

Specifically, the affidavit sets forth that Georgia Bureau of Investigation ("G.B.I.") Agent Wilkerson said that when he was in Petitioner's office on May 13, 1976,

the records were there. It further affirmed that Special Investigator Gene A. Matthews, in telephone conversations with Petitioner on February 14 and 15, 1977, corroborated circumstantially that the records were still at the office. The warrant was issued on February 23, 1977.

G.B.I. Agent James Duff and Special Investigator Matthews executed the search warrants on the evening of February 23, 1977, after being delayed by Petitioner.

A motion by Petitioner to suppress the seized evidence was denied. Moreover, Petitioner's objections to admission of the seized evidence during trial was overruled.

Petitioner was indicted on forty-one separate counts of theft by deception. Petitioner was granted a plea in bar as to thirty of the counts on the grounds that those counts involved less than $100 and were therefore misdemeanors barred by the statute of limitations. The State appealed that judgment in *State v. Tuzman*, 145 Ga. App. 481, 243 S.E.2d 675 (1978).

Evidence relating to the barred counts was introduced at trial, under long established Georgia authority, for the purpose of showing Petitioner's guilty knowledge, motive, scheme and intent. The trial court instructed the jury regarding the limited nature of the evidence concerning Petitioner's conduct for which he was not on trial. The Special Prosecutor emphasized the same numerous times. In his charge, the trial judge repeatedly elucidated the point that Petitioner was only on trial on eleven felony counts and not on any misdemeanor count. He instructed the jury to find Petitioner "not guilty" if any felony count showed theft of $100 or less.

Petitioner was found guilty of three felony counts for theft by deception. He was sentenced to five years on

each count as a "First Offender," placed on probation, fined $2,000 on each conviction and ordered to pay restitution.

Petitioner filed a notice of appeal in the Supreme Court of Georgia on June 3, 1977. The case was transferred to the Court of Appeals of Georgia, where it was heard. The Court of Appeals affirmed the judgment of the trial court on April 5, 1978. A motion for rehearing was denied by the Court of Appeals of Georgia on April 28, 1978. The Georgia Supreme Court denied Petitioner's application for writ of certiorari on June 9, 1978.

Additional facts will be developed as necessary for a more thorough illumination of any issues raised in this petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. The admission of evidence of independent crimes used as proof of Petitioner's guilty knowledge, scheme, motive and intent does not violate his rights to a fair and impartial trial and jury, to equal protection, not to be placed twice in jeopardy for one offense, to have his guilt proved by the State, and to defend his cause before the courts.

During the trial, evidence was admitted over Petitioner's objection, concerning thirty misdemeanor counts that were barred by the statute of limitations. Respondent limited the use of the independent crime evidence to the proof of Petitioner's guilty knowledge, scheme, motive and intent.

Generally, evidence introduced in a criminal trial should only relate to the specific offense charged; however, there are several established exceptions which allow

such evidence to be received in special circumstances and for limited purposes. *United States v. Burkhart*, 458 F.2d 201 (10th Cir. 1972). There are a myriad of cases illustrating the widespread acceptance of these exceptions. One exception, which is widely recognized, is the use of evidence of independent crimes to prove criminal intent where the independent crime and the crime charged occurred in close proximity in time and the essential physical elements of both offenses are identical. *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973); *United States v. Alston*, 460 F.2d 48 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1972); *Jackson v. State*, 76 Ga. 551 (8) (1886).

Prior to admitting evidence of independent crimes for proof of intent, the probative value of the evidence is balanced against any prejudice that may result. *United States v. Cochran*, 499 F.2d 380 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1974); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974). This balancing precaution was observed in the instant case. The use of the evidence of the misdemeanor counts was justified because the evidence tended to prove an intent which was an essential element of the offense on trial. In contrast, the evidence was not overly prejudicial because the jury was instructed throughout the trial that Petitioner was on trial only for the eleven felony charges. For instance, the Special Prosecutor, in his opening statement, was very clear in his explanation to the jury about the limited purpose of this evidence. On each occasion the State introduced evidence of the misdemeanors, the jury's attention was called to the fact of the limited purpose of the evidence. Finally, in the closing argument the Special Prosecutor reemphasized the limited purpose of the independent crime evidence. The trial court's decision that the probative value of such

evidence outweighed the danger of the prejudice was affirmed by the Court of Appeals of Georgia. *Tuzman v. State*, 145 Ga. 761, 244 S.E.2d 882 (1978). The Court of Appeals' position is in line with the prevailing view that the balancing of probative and prejudicial values should be left largely within the sound discretion of the trial judge. *United States v. Byrd*, 352 F.2d 570 (2nd Cir. 1965). Moreover, the trial court judge must be given considerable latitude in allowing evidence to show the element of intent. *Holt v. United States*, 342 F.2d 163, 166 (5th Cir. 1965).

Contrary to the Petitioner's view, the Georgia exclusionary rule, which can be found in Ga. Code Ann. § 38-202, has not been carried to an "unconstitutional extreme." It is generally accepted that an acquittal of the accused of an offense does not render evidence of that offense inadmissible at a later criminal trial where such evidence is otherwise competent. *United States v. Welborn*, 322 F.2d 910 (4th Cir. 1963); *Thomas v. State*, 239 Ga. 734, 238 S.E.2d 888 (1977); *Lee v. State*, 8 Ga. App. 413, 69 S.E. 310 (1910); *People v. Johnston*, 328 Mich. 213, 43 N.W.2d 334 (1950); *Taylor v. Commonwealth*, 186 Va. 587, 43 S.E.2d 906 (1947).

In the instant case, the Court's application of the exclusionary rule is particularly valid because of the close connection between the independent crime and the offense on trial. Petitioner, a dentist, was charged with stealing money under the Medicaid Program by making claims and receiving payments for work which he falsely claimed to have performed. The basic issue was whether his conduct resulted from an intention to steal or was it the result of honest mistakes. The evidence of his conduct in the processing of similar claims on the same and different

patients, from those named in the indictment, relating to similar dental treatment, the same administrative and dental process, and involving the same program during the same period of time, was highly relevant and material to the issue of intent. Hence, there was a substantial logical connection, so that the proof of one tended to prove the other.

Different jurisdictions vary as to the degree of proof required for admissibility of independent crime evidence, but the decisions in Georgia construing Ga. Code Ann. § 38-202 clearly do not require proof of the *corpus delicti*. *Anderson v. State*, 222 Ga. 561, 150 S.E.2d 638 (1966); *New v. State*, 67 Ga. App. 442, 20 S.E.2d 617 (1942). The State, nonetheless, has to show that the defendant on trial is the same person involved in those independent crimes. *French v. State*, 237 Ga. 620, 229 S.E.2d 410 (1976); *Howard v. State*, 211 Ga. 186, 84 S.E.2d 455 (1954). The proof of identity required in *French* and *Howard* is sufficient to assure that the evidence on the independent crime is more than a "mere suspicion." This conclusion is further supported by an assertion stated earlier in this brief: the independent crime and the crime charged are so intimately related that the proof of one cannot be made without showing of facts tending to establish the other.

Therefore, the introduction of evidence of very similar independent crimes did not violate Petitioner's constitutional rights. Consequently, his petition for a writ of certiorari based upon this argument should be denied.

II. The search warrant was based upon substantial and ample probable cause in the form of an affidavit and considerable oral testimony; thus, Petitioner's right to be safe from our unreasonable search and seizure was not violated.

In the present case, it was reasonable for the judge issuing the search warrant dated February 23, 1977, to conclude that the items to be seized were still located in the Petitioner's office.

Staleness relates to the probability of whether or not the evidence to be seized is still at the location to be searched. *United States v. Rahn*, 511 F.2d 290 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). The affidavit in support of the warrant application showed that there was a direct observation of the Petitioner's office files on May 13, 1976. It further affirms that Special Investigator Matthews, in telephone conversations with Petitioner on February 14 and 15, 1977, corroborated circumstantially that the records were still at the office. The warrant was issued on February 23, 1977. Attached to the affidavit and incorporated therein was Petitioner's Medicaid Agreement wherein he agreed to keep such records as those sought.

In issuing a search warrant the judge must exercise his own judgment as to whether the facts alleged in the affidavit constitute probable cause for issuance of the warrant; he must act on the entire picture disclosed to him; he is entitled to use his common sense; and the courts have gone so far as to say that when this is done, his determination is conclusive in the absence of arbitrariness. *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir. 1973).

In view of the facts in this case and the prevailing principle of law it was reasonable for the issuing judge to conclude that the records were still at the Petitioner's office.

Assuming, *arguendo*, that there was a nine month time gap between the issuance of the search warrant and the date on which the State had solid information as to the

whereabouts of the items seized, the type of crime and evidence involved prevents a staleness problem from arising in this case.

In *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed 260 (1932), this Court spoke to the issue of timeliness in a case involving a search under the National Prohibition Act. Although this Court found that a search executed twenty days after obtaining the information leading to the issuance of the warrant was invalid, *Sgro* also held that timeliness as an element in probable cause must be determined *by the circumstances of each case.*

In analyzing the circumstances of each case the question is one of reasonableness: Is the lapse of time so long that it is no longer reasonable to believe that the same conditions described in the affidavit remain at the time the warrant is issued? *Fowler v. State*, 121 Ga. App. 22, 172 S.E.2d 447 (1970). Factors to take into account in reaching a decision are the nature of the evidence sought and the unlawful activity. *United States v. Harris*, 482 F.2d 1115 (3rd Cir. 1973); *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972).

The evidence seized, in the instant case, included records that Petitioner was required to maintain and keep for considerable periods of time because of his Medicaid Agreement. Consequently, there was reason to believe that the documents would, in all probability, be preserved for more than the nine month period in question.

This Court recently upheld a warrant against a similar argument in a case where there had been a three month delay between the completion of the transactions on which the warrants were based and the ensuing action. *See Andresen v. Maryland*, 427 U.S. 463, 478 n.9, 96 S.Ct. 2737, 49 L.Ed.2d 467 (1976). The records, in the present

case, were prepared in the ordinary course of business and are much the same as the attorney's files in *Andresen;* they are permanent in character and they are likely to be maintained in one place much longer than would illicit drugs, stolen merchandise, or murder weapons. It would, therefore, be reasonable to believe that a nine month lapse would not prevent a proper determination that there was probable cause to believe the records would be found in appellant's office.

It is the State's conclusion that the Georgia Court of Appeals was correct in finding that the warrant was properly issued; therefore, this Court should deny Petitioner's request for writ of certiorari.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia for the reasons set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Brief for the Respondent in Opposition upon Mr. G. L. Dickens, Jr., at the address listed below, by placing the same into the United States Mail in a properly addressed envelope with first class postage placed thereon.

Mr. G. L. Dickens, Jr.
Dickens, Mangum & Burns, P.C.
Attorneys at Law
140 West Washington Street
Milledgeville, Georgia 31061

This ____ day of _____, 1978.

_____

MICHAEL J. BOWERS
Senior Assistant Attorney General